IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-290

ELIAZAR HERRERA-VINEGAS,
GUSTAVO MARTINEZ-FRAGOSO,
FERNANDO GALINDO-HERRERA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATIONS

Cases:

IN THE

Supreme Court of the United States

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No.

ELIAZAR HERRERA-VINEGAS,
GUSTAVO MARTINEZ-FRAGOSO,
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vs.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ELIAZAR HERRERA-VINEGAS, GUSTAVO MARTINEZ-FRAGOSO, and FERNANDO GALINDO-HERRERA, the

petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered on February 3, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit No. 77-5737 is unreported and is printed in Appendix B hereto, *infra,* page 11a. The denial of the Court of Appeals for the Fifth Circuit of a timely petition for rehearing, and that it be en banc June 21, 1978 is printed in Appendix B hereto, *infra,* page 14a. Judgment of the U.S. District Court of Western District of Texas, Del Rio Division, not yet reported. Its oral decision and judgment is contained in the Record at folios 477 to 484 (*Infra,* pages 15a-21a).

JURISDICTION

The judgment of the U.S. Court of Appeals (Appendix B, *infra,* page 11a) was entered on May 16, 1978. A timely filed petition for rehearing was denied on June 21, 1978 (Appendix B, *infra,* page 14a). The jurisdiction of the court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Petitioners were tried in the U. S. District Court for the Western District of Texas, Del Rio Division, for violation of 21 U.S.C. §963; conspiracy to import controlled substance, 21 U.S.C. §952(a); and §960(a)(1); illegal importation of controlled substance, 21 U.S.C. §846; conspiracy to possess and distribute a controlled substance; and 21 U.S.C. §841(a)(1); possession of controlled substance with intent to distribute. They were found guilty as charged on all counts (4) and sentenced on October 25, 1977

intent to distribute. They were found guilty as charged on all counts (4) and sentenced on October 25, 1977 to 45 years in prison plus 45 years in special parole. From this sentence they appealed to the U. S. Court of Appeals for the Fifth Circuit, which in a Per Curiam dated May 16, 1978 affirmed the judgment appealed. A timely filed motion for rehearing was also denied on June 21, 1978.

The questions thereby arising are:

1. Were the petitioners insured their right to a fair trial according to the 6th Amendment U. S. Constitution in the U. S. District Court for the Western District of Texas, affirmed by the Court of Appeals, 5th Circuit, when no interpreter was provided to help them communicate with their counsels during the trial? The petitioners' lack of knowledge of the English language was also known to their counsels, but they never petitioned the Court for providing an interpreter as herein stated, denying the petitioners the due process of law, and their right to continuous consultation, (*Geders v. United States,* 425 U.S. 80 (1976) In *Geders, supra,* it is said that . . . "the defendant has the right to be present for all testimony and may discuss his testimony with his attorney . . ." It is also said that "the defendant has the right to be present for all testimony and may discuss his testimony with his attorney . . ." In the instant case petitioners, because of their lack of knowledge of English, were deprived of their right to understand the proceedings. It has the same effect as if they were absent for all practical purposes. It is the petitioners' contention that they should have been advised of their right to have somebody who could explain the proceedings inasmuch as their counsels did not understand the Spanish language, which was the petitioners' vernacular language.

When the Judge was going to sentence the petitioners, it was brought to the attention of the Court that they could not understand English, that an interpreter was necessary, violating their right to understand what was going on in the trial. (Appendix B, pp. 15a-21a, T. R. 477-478)

2. Were the petitioners insured their right to a fair trial, when the trial court, disregarding their request for a postponement of the trial date in order to obtain adequate witnesses, overruled their motion for postponement alleging that the Speedy Trial Act did not permit such continuance, using the Speedy Trial Act against the best interests of the petitioners? (18 U.S.C. 3161)

3. Were the petitioners insured of their right to a fair trial, when the trial court forced them to go into trial without being ready, as announced by their counsels? Not having a single witness in their defense, nor an interpreter to explain them the proceedings during trial for their lack of knowledge of the English language. This occurred mainly because of the distance from their place of residence where the crimes were supposedly committed, Chicago, Ill., to the place where the trial was held, in Del Rio, Texas.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U. S. Constitution
   VI Amendment – Appendix A, page 1a.
2. Jurisdiction of U.S. Supreme Court
   Courts of Appeals; Certiorari, Appeal,
   Certified Questions (Appendix A at p. 1a)
   28 U.S.C. 1254(1)
3. Possession of Controlled Substance
   With Intent to Distribute - P. L. 91-513 -
   Oct. 27, 1970 (Appendix A at p. 1a) 21 U.S.C. §841(a)(1)

4. Conspiracy to Possess and Distribute a
   Controlled Substance - P.L. 91-513 -
   Oct. 27, 1970 (Appendix A at p. 2a) 21 U.S.C. §846
5. Illegal Importation of Controlled
   Substances - P.L. 91-513 -
   Oct. 27, 1970 (Appendix A at p. 2a) 21 U.S.C. §952
6. Conspiracy to Import Controlled
   Substance - P.L. 91-513 -
   Oct. 27, 1970 (Appendix A, at p. 3a) 21 U.S.C. §963
7. Public Law 93-619 - Tit. 1 -
   Jan. 3, 1975 - Speedy Trial Act
   Pertinent Parts
   (Appendix A at pp. 4a-10a) 18 U.S.C. § 3161
8. Rule 21(b) of the Federal Rules
   of Criminal Procedure
   Pertinent Parts (Appendix A at p. 3a) 18 U.S.C. §21(b)

STATEMENT OF THE CASE

Petitioners were arrested on June 11, 1977, in Chicago, Illinois. Ten days later they were indicted by a Grand Jury in the Western District of Texas, for violations of 21 U.S.C. 963; 21 U.S.C. 952(a) and §960(a)(1); 21 U.S.C. § 846; 21 U.S.C. §841(a)(1) – for conspiracy to import 23 pounds of heroin into the United States; illegal importation of

23 pounds of heroin; conspiracy to possess with intent to distribute 23 pounds of heroin; and possession with intent to distribute 23 pounds of heroin.

Despite the petitioners' motions for reduction of bail of $250,000.00 each, and for the transfer of the case from the Western District of Texas to Northern District of Illinois under Rule 21(b), Federal Rules of Criminal Procedure, being there their place of residence; these motions were never heard. Defendants motion to postpone the trial date in order to procure proper legal assistance and various witnesses, was also denied without a hearing, proceeding to begin the trial promptly on August 15, 1977 despite the announcement of "not ready" made by the defense counsel. No defense witnesses were used, mainly because of the impossibility of transporting them from Chicago, Illinois, to Del Rio, Texas, where the trial by jury was held.

The result of the trial was a conviction on the four counts of the indictment, and sentenced on October 25, 1977 to a combined sentence of 45 years to each petitioner, with a special parole of 45 years, plus $100,000.00 fine to petitioner Eliazar Herrera-Vinegas ($25,000.00 on each count of the indictment).

The basis for the indictment in this case was an occurrence on June 8, 1977, that took place in the port of entry at Del Rio, Texas, where Alfredo Alamo-Ramirez was arrested for entering the United States from Mexico in his own car, 23 pounds of heroin in a false gas tank compartment. Alamo-Ramirez agreed to cooperate with Drug Enforcement Administration to continue the investigation with the result that the petitioners were arrested and indicted as herein stated.

The case tried was based primarily on the testimony of Alamo (an un-indicted co-conspirator acting as agent of the United States Government) and a number of surveillance agents, and chemists from Drug Enforcement Administration, Chicago office, who intervened in the subsequent events from Alamo's arrest in Del Rio port of entry until he reached Chicago, and involved the petitioners in the smuggling of heroin from Mexico to the United States. It should be seriously considered that Alamo-Ramirez never before had anything to do with the petitioners and that he (Alamo) was a smuggler for an individual named Jesus Medina, from whom he collected an amount of money ($8,000.00) for each trip to Mexico.

The involvement of the petititioners came as a result of contacts made by Alamo-Ramirez with an unknown individual in Mexico, who supposedly put Alamo-Ramirez in contact with the petitioners, especially with Eliazar Herrera-Vinegas, bringing as a result the arrest of the petitioner and the seizure of heroin and money supposedly from drug transactions, when they received Alamo-Ramirez's car and paid $3,000.00 for the heroin which was supposed to come in it from Mexico, but that was already on the hands of the Drug Enforcement Administration's agents that had Alamo-Ramirez under surveillance from Del Rio, Texas, to Chicago, Illinois, where the transaction took place.

The petitioners contend that they were denied due process of law and a fair trial in the following instances:

1. When the trial court abused its discretion by denying the motion to transfer the case for trial from the Western District of Texas to the Northern District of Illinois, under Rule 21(b), of the Federal Rules of Criminal Procedure, precluding the peti-

tioners from procuring the witnesses they needed, for their defense.

2. When denied their motion for the postponement of the trial, even without a hearing, denying them, at the same time, the opportunity to get adequate legal advice and including an interpreter for proper and continued communication with their legal counsel. This action denied them adequate opportunity to prepare for trial.

3. When denied them their motion for postponement of the trial because the Speedy Trial Act requirements, to even when the petitioners waived any benefits they might have under said Act, which cannot become *a straight jacket* to the cases and to people accused of public crimes, when it should be the contrary.

4. When petitioners were forced into trial without an interpreter necessary to keep them informed of the proceedings during the trial. It is a very significant fact that when the principal witnesses for the prosecution, who is Mexican also, was on the witness stand, an interpreter was provided to help him ellicit his testimony, but that very same benefit was never offered to the petitioners, except at the moment of sentencing, when the Court was informed that they did not understand the English language. (Appendix B, pp. 15a-21a, T.R., pages 477-478) (See letter from former counsel Mr. Percy Forman to petitioner Eliazar Herrera-Vinegas, dated April 29, 1978, Appendix C).

   This action denied a fair trial for the petitioners, giving the impression of prejudice against them because of their racial and ethnic origin, and to

minority groups, on the part of our Federal Criminal Justice system. This negative impression is reinforced by the hearing granted for the motions the same day of the trial and disposed of them promptly in the morning to begin the selection of the Jury in the afternoon of August 15, 1968.

This impression must be corrected by this Honorable Court with the issuance of this Writ and its subsequent opinion.

5. When the Court of Appeals for the Fifth Circuit dismissed with a couple of words in a Per Curiam opinion the appeal by the petitioners, in which substantial questions none of them frivolous, which required a determination on its merit, conveying the impression of prejudice against the petitioners, similar to the trial court. (Appendix B, Page *infra*)

REASONS FOR GRANTING THE WRIT

1. As appears from the Statement of the Case (pages 5 to 9) an exceptionally strong showing was made in the Court of Appeals that petitioners' appeal raises abundant and substantial questions – none of them frivolous – requiring appellate's determination on the merits by the Court of Appeals. The Court of Appeals nevertheless dismissed with a very short Per Curiam opinion the contention of the petitioners as "without merit" with no arguments whatsoever. By so doing, the Court of Appeals for the Fifth Circuit committed error of far reaching dimensions and has brought about fundamental denial of justice to the petitioners, of Mexican origin, and belonging to

minority groups, but deserving the same treatment as any other citizen of this country. Such denial of justice is being inflicted upon petitioners as a consequence of their national and ethnic origin, a result which should be made impossible under our Constitution, one of whose main purpose is to establish justice and to secure the blessings of liberty. These blessings of liberty have been denied to petitioners Herrera-Vinegas, Martinez-Fragoso and Galindo-Herrera.

2. The Court of Appeals affirmance of the trial court's refusal to transfer the place of trial to the place where the crimes were committed, denied the petitioners a fair trial, and although it is not a constitutional right to transfer, it's denial should not be arbitrary. (*United States v. McManus*, 535 F.2d 460 (8th Cir. 1976); *United States v. Panebianco*, 543 F. 2d 447 (2d Cir. 1976) – "Venue turns on whether any part of crime was committed within the district, and the government need only prove venue by preponderance of evidence"; *United States v. Rivera*, 388 F.2d 545 (2d Cir. 1968) – "Venue is important as a guarantee of defendant's right to be tried in vicinity of his criminal activity and to prevent government from choosing favorable tribunal or one which may be unduly inconvenient for defendant"; *United States v. Rodriguez*, 465 F.2d 5 (2d Cir. 1972) – "Questions of venue in criminal case raise issues of constitutional dimensions"; *United States v. Mandel*, 431 F. Supp. 90 (D. Md. 1977) – "Defendant has constitutional right to be tried in district where offense is alleged to have been committed."). On the other hand, when there is doubt regarding the place of trial, it should be decided in favor of the accused. (*United States v. Sweig*, 316 F. Supp. 1148 (S.D.N.Y. 1970).

For the above reason, the trial court should have ordered the transfer of the place of trial to the Northern District of Illinois from the Western District of Texas.

3. Regarding the motion to postpone the trial denied by the trial court and affirmed by the Court of Appeals, Fifth Circuit, constitutes a sweeping departure from accepted course of judicial proceedings; denying the petitioners at least the minimum time for procuring the most proper legal assistance, including the necessary interpreters, to insure their right to continuous consultation throughout the proceedings (*Geders v. United States*, 425 U.S. 80 (1976)). The allegations by the trial court Judge, that the Speedy Trial Act precluded the postponement of the case, turns the spirit of the statute into a straight jacket, which has the purpose of denial to the accussed fair trial, instead of an orderly and expeditious disposition of the criminal cases in the Federal jurisdiction, that was the final effect the Court's denial had on the petitioners. Exercise of this Court's power of supervision would accordingly be called for in order to prevent the recurrence of such violation of the petitioners due process and their right to a fair trial.

4. As to forcing the petitioners into trial without an interpreter provided by the Court to keep them informed of the proceedings in their trial, the result of which was a sentence of 45 years in prison and 45 years in special parole, is a flagrant violation of their due process and their right to a fair trial. That was not noticed by the Court of Appeals which, as stated before, affirmed these convictions with a simple and very short Per Curiam opinion. At all

stages of the proceedings, the due process and Equal Protection Clause protect persons like the petitioners from flagrant discrimination for racial, ethnic or national origin or any other reason. This type of discrimination is violative of the entire spirit of fairness and equality upon which our judicial institutions are founded.

In the administration of federal criminal justice, there is no room for discriminatory procedures, which would turn aliens into a kind of second (*or third class*) citizens. (*Coppedge v. United States*, 369 U.S. 438 (1962)) (Emphasis added).

This nation is made up of aliens and immigrants from all parts of the globe, and this precisely is a characteristic which has made our country great. This Court, in its supervisory power over the judicial system, cannot permit that the greatness our nation has achieved be tarnished by not granting the ordinary citizen all the rights, privileges reserved in our Constitution for our citizens, even when tried and incarcerated for crimes committed.

CONCLUSION

FOR THE FOREGOING REASONS, this Petition for Writ of Certiorari should be granted. We respectfully ask to this Honorable Court for a hearing in this case.

Respectfully submitted,

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APPENDICES

APPENDIX A

CONSTITUTIONAL PROVISIONS

AMENDMENT VI–JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISIONS

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

21 U.S.C. § 841. Prohibited acts A –-Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

21 U.S.C. §846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. §952. Importation of controlled substances – Controlled substances in schedules I or II and narcotics drugs in schedules III, IV or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter except that–

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States–

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

21 U.S.C. §963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter, is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 U.S.C. §21(b)
Rule 21(b) of the Federal Rules of Criminal Procedure

Rule 21. Transfer from the District for Trial

(a) . . . .

(b) **Transfer in Other Cases.** For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

(c) . . . .

Speedy Trial Act (P.L. 93-619)

18 U.S.C. §3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from arraignment on the information or indictment at such place within the district, as fixed by the appropriate judicial officer.

(d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense based on the same conduct or arising from the same criminal episode, the provisions of subsection (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

(f) Notwithstanding the provisions of subsection (b) of this section for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to–

(A) delay resulting from an examination of the defendant, and hearing on, his mental competency, or physical incapacity;

(B) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from trials with respect to other charges against the defendant;

(D) delay resulting from interlocutory appeals;

(E) delay resulting from hearings on pretrial motions;

(F) delay resulting from proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure; and

(G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly–

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promtply seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

APPENDIX B

OPINION OF THE U. S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5737
Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- vs -

ELIAZAR HERRERA-VINAGAS,
GUSTAVO MARTINEZ-FRAGOSO,
FERNANDO GALINDO-HERRERA,

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

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[May 16, 1978]

Before BROWN, Chief Judge, COLEMAN, and VANCE Circuit Judges

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409.

PER CURIAM:

Appellants appeal from their jury convictions of conspiracy to import twenty-three pounds of heroin from the Republic of Mexico in violation of 21 U.S.C. §§ 952(a) and 963, conspiracy to possess the heroin in violation of 21 U.S.C. §§ 841(a) and 846, and aiding and abetting the completed substantive offenses of importation and possession with intent to distribute in violation of 18 U.S.C. § 2. Each appellant was sentenced to a total of 45 years imprisonment and a 45 year special parole term. In addition appellant Herrera-Vinagas was fined $100,000.

Appellants raise two broad issues on appeal: first, whether the combined effect of the trial court's denial of appellants' motions to transfer, motions to reduce bond, and motions to postpone the trial denied appellants due process of law and a fair trial; and second, whether the evidence was sufficient to support their convictions.

A close examination of the record reveals that each of appellants' contentions is without merit.

The Judgment is

AFFIRMED.

DENIAL OF THE COURT OF APPEALS OF A TIMELY PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

EDWARD W. WADSWORTH
Clerk

TEL 504-589-6514
600 Camp Street
New Orleans, La. 70130

OFFICE OF THE CLERK

May 8, 1978

TO COUNSEL OR PARTIES LISTED BELOW:

NO. 77-5737 - U.S.A. vs. ELIAZAR HERRERA-VINAGAS, ET AL.

Dear Counsel:

You are hereby notified that a panel of this Court, after due consideration and pursuant to Local Rule 18, has transferred the referenced case to the Summary Calendar for disposition.

Local Rule 18 states: "(a) Whenever the Court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar. (b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the Clerk, pursuant to directions from the Court. (c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar."

Yours sincerely,
EDWARD W. WADSWORTH, Clerk
By: /s/ Mary Beck Breaux
Deputy Clerk

/kjp
Mr. Mike DeGeurin
Ms. LeRoy Morgan Jahn

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

TEL 504-589-6514
600 Camp Street
New Orleans, La. 70130

June 21, 1978

TO ALL PARTIES LISTED BELOW:

NO. 77-5737 - U.S.A. v. ELIAZAR HERRERA-VINAGAS, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Brenda M. Hauck
Deputy Clerk

*on behalf of the appellants,

bmh

cc: Messrs. Percey Foreman
Mike DeGeurin
Ms. LeRoy M. Jahn

DISTRICT COURT OPINION

[Excerpt from Transcript of Proceedings]

477 October 25, 1977

10:00 a.m.

MR. PIERCE: Archie Carl Pierce for the government and we are ready to proceed.

THE COURT: All right

MR. FOREMAN: The defense is ready, Your Honor.

THE COURT: All right, Mr. Foreman, thank you. Mr. Herrera, your age is 25 years, is that right, sir?

MR. FOREMAN: Your Honor, there are two Herreras.

THE COURT: All right. Mr. Eliazar Herrera.

DEFENDANT HERRERA: Yes.

MR. FORMAN: I'm not certain of this man's ability to understand, Your Honor, English. I have had difficulty communicating with him.

THE COURT: Well, if you don't have one now, it's your responsibility to furnish us with an interpreter.

MR. FOREMAN: I didn't know that, Your Honor. I'm sorry. It is just my tardiness.

THE COURT: Mr. Bustamante is here. We didn't make any arrangements. We have an official interpreter, but you've got to let him know in advance because he has to serve three courts. But he happens to be in the courtroom this morning. All right Mr. Eliazar Herrera, your age is 25 years, is that right, sir?

DEFENDANT HERRERA: (Speaking through the interpreter.) Yes, Your Honor.

478 THE COURT: You are married and have one dependent, and that's your wife, is that right?

DEFENDANT HERRERA: Yes.

THE COURT: No children?

DEFENDANT HERRERA: No.

MR. FOREMAN: There is a child expected this month, Your Honor.

THE COURT: Mr. Foreman, have you had an opportunity to study and review with your clients the presentence report in this case?

MR. FOREMAN: I have had an opportunity to study it and I think I have adequately reviewed it. I have seen what's in it.

THE COURT: Have you or your client any comment with reference to it, that is, adding to it, subtracting from it or any general statement to make about it? I'm not asking you now for your allocution, but just with reference to the –

MR. FOREMAN: May it please the Court, considering the handicap the probation worker was working under geographically, I think he has done everything that could be done. There is no accusation against these men that are of any material import, except the offense itself as the the jury has determined.

THE COURT: All right, very well. Now Mr. Fernando Galindo-Herrera, your age is 19, sir?

DEFENDANT GALINDO: Yes, sir.

THE COURT: You attended school here in the United States, is that right?

479 DEFENDANT GALINDO: Yes, sir.

THE COURT: And you have actually completed nine years?

DEFENDANT GALINDO: Yes, sir.

THE COURT: You didn't graduate from high school, did you?

DEFENDANT GALINDO: No.

MR. FOREMAN: I think the report says he went to school nine years and completed the sixth grade.

THE COURT: Completed the sixth grade. I believe that's right. That's what it says. This is right. In this particular case, do you have any comments to make with reference to Mr. Galindo's presentence report, Mr. Foreman?

MR. FOREMAN: He is 19 years old, and as the report suggests, as he requests, he would like to be, if the Court thinks it proper, to be sentenced under the youth offenders act. He has no previous arrest of any kind, misdemeanors, traffic or otherwise, Your Honor.

THE COURT: Now Mr. Gustavo Martinez, your age is 30 years, is that right, sir?

DEFENDANT MARTINEZ: Yes, sir.

THE COURT: You have a wife and a son?

DEFENDANT MARTINEZ: Yes, sir.

THE COURT: All right. You are a citizen of the Republic of Mexico, is that right, sir?

DEFENDANT MARTINEZ: Yes, sir.

480 THE COURT: Now, you are familiar with the presentence report, you and your client?

MR. FOREMAN: Yes, I am.

THE COURT: Do you have anything to add to it, Mr. Foreman?

MR. FOREMAN: No, Your Honor.

THE COURT: Do you have any statements to make about it?

MR. FOREMAN: None.

THE COURT: All right Mr. Eliazar Herrera-Vinagas, what if anything do you have to say in your own behalf in the interest of mitigation or otherwise before I impose sentence in this case, sir?

DEFENDANT HERRERA: (Through the interpreter:) None.

THE COURT: I'll ask your lawyer if he would like to speak for you in a moment, sir.

All right Mr. Fernando Galindo-Herrera, what if anything do you have to say of allocution in the interest of mitigation or otherwise before I impose sentence in this case, sir?

DEFENDANT GALINDO: No, sir.

THE COURT: All right, you would like to have your lawyer speak for you, sir?

DEFENDANT GALINDO: Yes, sir.

THE COURT: All right Mr. Gustavo Martinez-Fragosa, what if anything do you have to say in your own behalf in the interest of mitigation or otherwise before I impose sentence in this case, sir?

DEFENDANT MARTINEZ: I don't know, Your Honor.

481 THE COURT: You will have to speak up, I can't hear you. In other words, you would like to have your lawyer speak for you, is that what you are telling me?

DEFENDANT MARTINEZ: Yes.

THE COURT: All right Mr. Foreman, you are employed counsel, is that right?

MR. FOREMAN: Yes, Your Honor.

THE COURT: What if anything do you have to say

by way of allocution in the interest of mitigation or otherwise for your clients before I impose sentence in this case, sir?

MR. FOREMAN: Only that we realize our position. We have been convicted, our clients have, and we have had a fair investigative report. These men, one of them, has been arrested once before, I believe for drunk driving. That's Mr. Gustavo Herrera. The other two men have never been convicted of any offense.

They realize that this is a serious offense. I don't personally envy the Court's responsibility in imposing sentence. I know that we will receive what the Court thinks is a fair sentence.

THE COURT: Very well. Eliazar Herrera-Vinagas, I hereby sentence you on count one of the indictment to be committed to the custody of the Attorney General for a period of 15 years and I fine you in the amount of $25,000. Said sentence is to be followed by a special parole term of 45 years.

On count two of the indictment, I hereby sentence you to be committed to the custody of the Attorney General for a period of 15 years and fine you the sum, in the
482 total sum of $25,000. Said sentence to be followed by a special parole term of 45 years.

The sentence imposed on count two of the indictment is to run consecutively to the sentence imposed on count one.

On count three of the indictment I hereby sentence you to be committed to the custody of the Attorney General for a period of 15 years and fine you $25,000. Said sentence imposed on count three of the indictment is to be served concurrently with the sentence imposed on count one.

On count four of the indictment I hereby sentence you

to be committed to the custody of the Attorney General for a period of 15 years and fine you in the amount of $25,000. This sentence is to be followed by a special parole term of 45 years. The sentence imposed in count four of the indictment is to run consecutively to the sentence imposed in count two.

The Court hereby invokes Rule 38A of the Federal Rules of Criminal Procedure and requires the defendant to deposit the $100,000 fine into the registry of the Court. Said deposit shall be made from the funds found in the possession of the defendant at the time of the arrest, used as evidence in this trial, unless other funds or cooperate surety can be made by the defendant.

The Court hereby finds that this defendant would not benefit from the provisions of the Youth Correction Act. I have considered it. The total term in his sentence is 45 years to serve and a 45 year special parole term.

483 Now, Fernando Galindo-Herrera, I hereby sentence you on count one of the indictment to be committed to the custody of the Attorney General for a period of 15 years, to be followed by a special parole term of 15 years.

On Count two of the indictment, I hereby sentence you to be committed to the custody of the Attorney General for a period of 15 years, to be followed by a special parole term of 15 years.

The sentence imposed on count two of the indictment is to be served consecutively to the sentence imposed on count one.

Count three of the indictment I hereby sentence you to be committed to the custody of the Attorney General for a period of 15 years, to be followed by a special parole term of 15 years.

The sentence imposed on count three of the indictment is to be served concurrently with the sentence imposed on count one.

On count four of the indictment, I hereby sen

On count four of the indictment, I hereby sentence you to be committed to the custody of the Attorney General for imprisonment for 15 years, to be followed by a special parole term of 15 years. The sentence imposed on count four of the indictment is to run consecutively to the sentence imposed on count two.

I hereby find that the Youth Corrections Act would not benefit you although I have considered it. This is a total sentence of 45 years to serve with a 45 year special parole term.

Gustavo Martinez-Fragosa, I hereby sentence you on count one of the indictment to the custody of the Attorney General for imprisonment of 15 years, to be
484 followed by a special parole term of 15 years.

On count two of the indictment, I hereby sentence you to be committed to the custody of the Attorney General for a period of 15 years, to be followed by a special parole term of 15 years. The sentence imposed on count two of the indictment is to be served consecutively with the sentence imposed on count one.

On count three of the indictment I hereby sentence you to be committed to the custody of the Attorney General for imprisonment for a period of 15 years, to be followed by a special parole term of 15 years. The sentence imposed on count three of the indictment is to be served concurrently with the sentence imposed on count one of the indictment.

Count four of the indictment, I hereby sentence you to be committed to the custody of the Attorney General for a period of 15 years, to be followed by a special parole term of 15 years. The sentence imposed on count four of the indictment is to be served consecutively to the sentence imposed on count two. In summary, it is 45 years to serve with a 45 year special parole term. For all defendants, a total of 90 years. You may be excused.

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APPENDIX C

[Letter of Mr. Percy Forman to Mr. Eliazar Herrera-Vinagas regarding his lack of knowledge of English.]

LAW OFFICES OF

FOREMAN & DeGUERIN

512 First National Life Building

HOUSTON, TEXAS 77002

PERCY FOREMAN
DICK DeGUERIN

MAIN AT RUSK
(713) 224-9321

April 29, 1978

Mr. Eleazar Herrera
No. 02971-164
P. O. Box 1000
Leavenworth, Kansas 66048

Dear Eleazar:

I have your letter of April 19th.

If you will prepare and present whatever questions you like, I will undertake to answer them. But, I do not propose to send you copies of the record, nor our motions, nor our brief. You do not speak English. You could not possibly understand the issues involved and I do not propose to carry on a correspondence with some lawyer serving time in the penitentiary or some convict who thinks he is a lawyer. I have learned over the years that this only brings on misunderstandings. The penitentiary lawyer is always wanting to show how smart he is and starts picking at each, any and every tactic of the defense lawyer. There is no possible way you could do research in the law and if you are going to listen to some smart ass, that is your business. But I don't have to put up with him, whoever he is and will not.

smart ass, that is your business. But I don't have to put up with him, whoever he is and will not.

If you want to know exactly where we are, I am here, you are in the Leavenworth Penitentiary and the Court is in New Orleans, Louisiana.

We wait from week to week their decision. The fact that they are taking this long makes me believe we have hope.

One of the decisions you needs must make in the event the Opinion in New Orleans comes against us is whether or not you want to carry the case on to the United States Supreme Court. We are prepared to do this for you, in case you so elect and likewise in case we do not win in the Circuit Court of Appeals for the Fifth Circuit. However, there will be an additional charge if the case does go against us in New Orleans and we are required to apply for writ of certiorari in the Supreme Court at Washington.

Your wife had someone call. He and she wanted to meet me with you at Leavenworth. I told him that I would be available, but would require payment for two days time and traveling expenses in the amount of approximately Five Thousand ($5,000.00) Dollars and Five Hundred ($500.00) Dollars for the expenses. I have heard nothing further from him. But, I will make myself available if you and they want to spend this money.

You may be assured that everything that can be done for you has been and will be done.

Sincerely yours,

/s/ Percy Foreman
Percy Foreman

PF:m PF:ma

No. 78-290

In the Supreme Court of the United States

OCTOBER TERM, 1978

ELIAZAR HERRERA-VINEGAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
JODY M. LITCHFORD
Attorneys
Department of Justice
Washington, D.C. 20530

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11a-12a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1978 (Pet. App. 11a). A petition for rehearing was denied on June 21, 1978 (Pet. App. 14a). On July 19, 1978, Mr. Justice Powell extended the time for filing a petition for writ of certiorari to and including August 10, 1978, and on August 14, 1978, he further extended the time for filing to and including August 20, 1978, a Sunday. The petition was filed on August 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court should have appointed a Spanish-English interpreter.

2. Whether the trial court abused its discretion in denying petitioners' motion to transfer the trial to Chicago.

3. Whether a motion for a continuance should have been granted.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioners were convicted of conspiracy to import 23 pounds of heroin into the United States from Mexico, in violation of 21 U.S.C. 963; conspiracy to possess heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846; and aiding and abetting the substantive offenses of importation and possession with intent to distribute (Pet. App. 12a). They were each sentenced to a total term of imprisonment of 45 years, with a 45-year special parole term. In addition, Herrera-Vinegas was fined $100,000 (*ibid.*).

The evidence showed that Alfredo Alamo-Ramirez, an unindicted co-conspirator, was apprehended on June 8, 1977, as he attempted to bring 23 pounds of heroin into Texas from Mexico (Tr. 113-122, 154). The narcotic was hidden in a compartment of the gas tank of his car (Tr. 113-118, 262). Alamo-Ramirez told Drug Enforcement Administration agents that he was to telephone a man known as "Charro" when he reached Chicago and deliver the heroin to him (Tr. 153-154, 259).

Alamo-Ramirez agreed to go with the agents to Chicago and to call Charro as he had originally planned (Tr. 136, 264). Petitioner Herrera-Vinegas, who identified himself as "Charro," answered the telephone (Tr. 181-182, 267) and arranged with Alamo-Ramirez for delivery of the heroin (Tr. 214-222). Petitioners Martinez-Fragoso and Galindo-Herrera actually appeared to accept delivery; they were arrested as they made the exchange (Tr. 239, 272-283). Herrera-Vinegas was arrested shortly thereafter at his home (Tr. 239).

ARGUMENT

1. Petitioners contend (Pet. 8-9, 11-12) that they were denied a fair trial because they were "forced to trial without an interpreter." This claim, which was not advanced in the court of appeals and therefore is not properly raised in this Court (see *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977)), is insubstantial.

Petitioners Martinez-Fragoso and Galindo-Herrera made no request for an interpreter at any time, nor did they indicate in any way that they had difficulty understanding or speaking English.[1] There is therefore no basis in the record for their claim that they were improperly denied an interpreter.

Petitioner Herrera-Vinegas did not ask for assistance before or during trial, but his counsel did state at sentencing "I'm not certain of this man's ability to understand, Your Honor, English. I have had difficulty communicating with him" (Tr. 477; Pet. App. 15a).[2] Herrera-Vinegas now claims that this belated assertion introduced reversible error into his entire trial.

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[1]The record shows that petitioner Galindo-Herrera is a lifelong resident of Chicago who went to school nine years and completed six grades in the United States (Tr. 478-479).

[2]A letter of defense counsel to petitioner Herrera-Vinegas, written after the case was argued on appeal, states "You do not speak English" (Pet. App. 22a-23a).

Contrary to petitioner's claim, he has no constitutional right to court appointment of an interpreter, since he is not indigent. *United States* v. *Desist*, 384 F. 2d 889, 901-903 (2d Cir. 1967); cf. *Gideon* v. *Wainwright*, 372 U.S. 335, 339-340 (1963). It was his responsibility in the first instance to obtain an interpreter, as the trial court noted (Tr. 477). He cannot fault the court for failing to inquire into his desire for a service that it was his responsibility to secure, and for which he did not indicate any need until the trial was completed and he had been convicted.

In any event, he was not prejudiced by not having an interpreter during trial. Herrera-Vinegas is a "long-time" resident of Chicago (Appellant's Brief on Appeal 17), and he was able to understand and answer the questions put to him at arraignment without apparent difficulty (Tr. 2-3). He points to no evidence that he in fact did not understand the proceedings. And when his counsel stated at sentencing that he thought an interpreter was necessary,[3] the court immediately instructed its interpreter to assist Herrera-Vinegas.

In these circumstances, there is no occasion for this Court to review Herrera-Vinegas' claim.

2. Petitioners contend (Pet. 6, 7-8, 10-11) that they were denied a fair trial because the court refused to transfer their case to Chicago. They claim that this refusal prevented them from obtaining witnesses who would testify in their defense.

[3]Counsel's remark at sentencing may well have reflected only counsel's concern about Herrera-Vinegas' ability to express himself fluently during allocution.

Transfer under Fed. R. Crim. P. 21(b)[4] is committed to the sound discretion of the trial judge. *Platt* v. *Minnesota Mining Co.*, 376 U.S. 240, 245 (1964). Here, the court responded to petitioners' claim that they could not bring defense witnesses to Texas for the trial by stating that it was willing to bring all necessary witnesses at government expense. But it asked first that defense counsel list the witnesses and their expected testimony (Tr. 10-12). The court explained that it needed this information so that the government would not be put to needless expense. Defense counsel refused to provide the requested information (Tr. 10). In these circumstances, and in view of the vagueness of the claims that useful witnesses could be found in Chicago (see Tr. 11), the court's refusal was entirely proper. See *United States* v. *Noland*, 495 F. 2d 529, 534 (5th Cir.), cert. denied, 419 U.S. 966 (1974).

3. Petitioners further contend (Pet. 6, 8, 11) that the trial court's refusal to grant them a continuance denied them a fair trial because counsel did not have adequate time to prepare and obtain witnesses.

A motion for continuance is addressed to the sound discretion of the trial court and its ruling should not be disturbed unless a clear abuse of discretion is shown. *Ungar* v. *Sarafite*, 376 U.S. 575, 588-591 (1964). Petitioners made their request for a continuance on August 15, 1977, the beginning date of the trial (Tr. 5-13). At that time, a month and a half had passed since petitioners' June 29, 1977, arraignment. Moreover, the

[4]Rule 21(b), Fed. R. Crim. P., provides:

> For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

facts of the case were not difficult, and full discovery had been ordered and complied with (III R. 82). Petitioners' allegations that additional witnesses could be interviewed were vague, and no evidence as to their actual availability or the usefulness of their testimony was provided to the court.

In these circumstances, petitioners' claims that they needed additional time to prepare were properly rejected by the trial court. See *United States* v. *Uptain*, 531 F. 2d 1281, 1286-1287 (5th Cir. 1976); *United States* v. *Miller*, 513 F. 2d 791, 793 (5th Cir. 1975).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
JODY M. LITCHFORD
Attorneys

OCTOBER 1978

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[5]The instant case presented none of the complexity or potential for miscarriage of justice that would have justified the trial court in granting a continuance under the Speedy Trial Act. See 18 U.S.C. 3161(h)(8)(A) and (B).

DOJ-1978-10